

EXHIBIT 16

Page 1

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
3 - - - - -
4 COMMODITY FUTURES TRADING :
5 COMMISSION, :
6 : :
7 Plaintiff, :
8 : :
9 : :
10 No. 22-cv-4563
11 v. :
12 : :
13 : :
14 GEMINI TRUST COMPANY, LLC, :
15 : :
16 Defendant. :
17 - - - - - x

Wednesday, August 23, 2023

Washington, D.C.

13 Videotaped Deposition of:

14 GREGORY KUSERK,
15 called for oral examination by counsel for the
16 Defendant, pursuant to notice, at the law offices of
17 Shearman & Sterling, LLP, 401 Ninth Street, Northwest,
18 Suite 800, Washington, D.C., before Christina S.
19 Hotsko, RPR, CRR, of Veritext Legal Solutions, a Notary
20 Public in and for the District of Columbia, beginning at
21 9:33 a.m., when were present on behalf of the respective
22 parties:



1 BY MS. LEE:

2 Q. Sure. Sure.

3 In or around 2017, did you make any
4 policy or policy decisions regarding
5 self-certifications?

6 A. No, I didn't.

7 Q. Do you have any experience with
8 self-certifications while working for anyone other
9 than the CFTC?

10 A. No.

11 Q. While working at the CFTC, was it your
12 responsibility to oversee any markets or products?

13 A. Repeat that again.

14 Q. Sure.

15 While working at the CFTC, was it your
16 responsibility to oversee any markets or products?

17 A. I would say yes. Uh-huh.

18 Q. What products or markets did you oversee
19 while working at the CFTC?

20 A. Pretty much anything that any exchange
21 was -- had listed.

22 Q. And what was your role -- what was your



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1 anybody telling me that.

2 BY MS. LEE:

3 Q. Did you think that anything in this
4 self-certification is false --

5 MR. RODGERS: So --

6 BY MS. LEE:

7 Q. -- or misleading?

8 MR. RODGERS: -- objection to the
9 question. I'm going to instruct the witness not
10 to answer on deliberative process grounds.

11 BY MS. LEE:

12 Q. Did anyone ever tell you this
13 self-certification omitted any material facts?

14 MR. RODGERS: Same objection.

15 You can answer to the extent it will not
16 reveal confidential Commission communications.

17 THE WITNESS: No.

18 BY MS. LEE:

19 Q. Did you think that there's anything in
20 this self-certification that omitted material
21 information?

22 MR. RODGERS: I'm going to instruct the



1 is?

2 A. I'm not aware of it, no.

3 Q. In the course of your work at the CFTC
4 over 32 years, have you ever given a definition of
5 market manipulation or heard of a definition of
6 market manipulation?

7 A. No, not that I'm aware of. No.

8 Q. To your knowledge, what is CFTC's
9 definition of whether a contract is readily
10 susceptible to manipulation?

11 MR. RODGERS: So object to the form of
12 the question.

13 You can answer to the extent it won't
14 reveal internal privileged communications that are
15 protected by the deliberative process privilege.

16 THE WITNESS: So let me ask you to repeat
17 your question.

18 BY MS. LEE:

19 Q. Sure. Sure.

20 So to your knowledge, what is the
21 definition of whether a -- what is the meaning
22 when someone says a contract is readily

1 susceptible to manipulation?

2 MR. RODGERS: So objection on
3 deliberative process grounds. I don't think he
4 can answer that without revealing his personal
5 opinion, so I'd instruct him not to answer.

6 THE WITNESS: All right.

7 BY MS. LEE:

8 Q. Is susceptible to manipulation different
9 from readily susceptible to manipulation?

10 MR. RODGERS: Same objection. I'd
11 instruct him not to answer to the extent it would
12 reveal his personal opinion, which is protected by
13 the deliberative process privilege.

14 BY MS. LEE:

15 Q. Who at the CFTC decides if a contract is
16 readily susceptible to manipulation?

17 A. So I think it would begin with, you know,
18 with the staff, you know, doing some kind of an
19 analysis. And, I mean, there could be many
20 different factors that might lead something to be
21 susceptible to manipulation.

22 But ultimately, I think if there was



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1 A. I'm not aware of any, no.

2 Q. Are there any documents from 2017 --
3 around 2017 that we can review to identify what
4 was discussed in this meeting on July 25th, 2017?

5 A. I'm not aware of any.

6 Q. Did you hear about any documents about
7 this meeting?

8 MR. RODGERS: You can answer to the
9 extent it won't reveal internal Commission
10 communications.

11 THE WITNESS: Yeah -- no, I'm not aware
12 of any.

13 BY MS. LEE:

14 Q. Did you ever determine that anything on
15 this Cboe slide deck from the meeting on
16 July 25th, 2017 -- did you ever determine anything
17 in there is false or misleading?

18 MR. RODGERS: So object to the form of
19 the question on relevancy grounds and deliberative
20 process, and I'm going to instruct the witness not
21 to answer.

22

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1 BY MS. LEE:

2 Q. Did you ever determine, in reviewing this
3 slide deck or attending the meeting on July 25th,
4 2017 -- did you determine or did the CFTC
5 determine that anything -- anything material has
6 been omitted?

7 MR. RODGERS: Objection. Same basis.

8 Same instruction.

9 BY MS. LEE:

10 Q. After attending this meeting on
11 July 25th, 2017, and attending the meeting where
12 this presentation slide deck was presented, did
13 you take any actions based on any statements
14 contained in this presentation or statement that
15 was made during the meeting on 20 -- July 25th,
16 2017?

17 MR. RODGERS: So objection to the
18 question.

19 You can answer to the extent it won't
20 reveal internal Commission communications or
21 predecisional deliberations.

22 THE WITNESS: Okay. So can I ask you to



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1 what are rebates?

2 MR. RODGERS: So same objection. Same
3 instruction. Because you're asking for his
4 personal opinion, it impacts the deliberative
5 process privilege.

6 VIDEO TECHNICIAN: Counsel, your arm is
7 rubbing the mic.

8 BY MS. LEE:

9 Q. It's not illegal to provide rebates,
10 right?

11 MR. RODGERS: Object to the form of the
12 question. Calls for a legal conclusion.

13 BY MS. LEE:

14 Q. Was it -- while you were at the CFTC, was
15 it a standard practice for exchanges to offer
16 incentives to encourage participation?

17 A. I believe there was but, again, that's
18 not an area that, you know, I would have focused
19 on at all.

20 Q. So rebates or incentives in and of
21 themselves do not make an exchange susceptible to
22 manipulation, right?

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1 MR. RODGERS: Objection. Calls for a
2 legal conclusion. And calls for his personal
3 opinion, which is protected by the deliberative
4 process privilege. And I'm going to instruct the
5 witness not to answer.

6 BY MS. LEE:

7 Q. So here on that bullet point that we were
8 just looking at, it states that market maker trade
9 fee rebates encouraged participation.

10 Did the CFTC ask who the market makers
11 are?

12 A. Not to my knowledge.

13 Q. Did the CFTC ask who were the market
14 makers who received the rebates from Gemini?

15 A. That -- I don't have any knowledge of
16 that.

17 Q. Do you remember any oral statements or
18 any discussion over rebates during the meeting on
19 July 25th, 2017?

20 A. I don't recall.

21 Q. Do you remember if anyone at the CFTC
22 asked about rebates or incentives during the



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1 addressed on question number 8 and answers to
2 question number 8, you said that you did not ask
3 any questions about market makers rebate program
4 to Gemini.

5 Why didn't you ask any questions?

6 MR. RODGERS: So that's -- I'm going to
7 instruct the witness not to answer based on the
8 deliberative process privilege.

9 BY MS. LEE:

10 Q. So after reviewing this Q&A document, did
11 you discuss this with anyone at the CFTC?

12 MR. RODGERS: Objection. I'm going to
13 instruct the witness not to answer on the basis of
14 deliberative process privilege.

15 BY MS. LEE:

16 Q. After reviewing this Q&A document, did
17 you think any of the content was false or
18 misleading?

19 MR. RODGERS: Same objection. Same
20 instruction.

21 BY MS. LEE:

22 Q. So we just looked at this August 25th,



1 (Kuserk Deposition Exhibit 14 marked for
2 identification and attached to the
3 transcript.)

4 BY MS. LEE:

5 Q. So this document I just marked as
6 Exhibit 14, it bears Bates number starting from
7 CFTC/Gemini/00013781 and ends at
8 CFTC/Gemini/00013927.

9 MR. RODGERS: Sorry, can I get a copy?

10 MS. LEE: Oh, sorry.

11 MR. RODGERS: That's okay. And this
12 is 14?

MS. LEE: Yes. 14.

14 BY MS. LEE:

15 Q. Okay. So if you look at the first page
16 of this Exhibit Number 14, it's an e-mail. It's
17 an e-mail initially sent from Nicole Gordon from
18 Cboe on September 12th, 2017, to Chris Goodman at
19 the CFTC.

Do you see that?

21 A. Yes.

O. Okay. And Mr. Goodman forwarded this

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1 e-mail to a number of people at the CFTC,
2 including yourself, Mr. Kuserk.

3 Do you see your name?

4 A. Yes.

5 Q. And this e-mail has attachments. Let's
6 look at the first attachment. It's titled,
7 "Gemini Trust Company Policies and Procedures
8 Manual."

9 A. Yes.

10 Q. And let's go to page 46.

11 And in the middle of the page there's the
12 title "Agreements Granting Preferential Terms."

13 Do you see that?

14 A. Yes.

15 Q. And then, below that, it's the subtitle
16 "Policy."

17 A. Right.

18 Q. And that paragraph below that, below the
19 word "policy" states, "Our organization may
20 provide certain high-volume users, market makers,
21 or other special-case users with terms different
22 from those given under the standard user agreement

1 and fee schedule."

2 A. Yes. I see --

3 Q. Right?

4 A. -- that.

5 Q. So Gemini disclosed that it sometimes
6 provides certain users with more favorable terms,
7 right?

8 MR. RODGERS: Sorry. Disclosed to whom?
9 Otherwise, I object on the basis of vague and
10 ambiguous. And also, you know, he's not here as a
11 CFTC witness.

12 BY MS. LEE:

13 Q. When you first received this e-mail from
14 Mr. Goodman and reviewed this document, what was
15 your understanding of what the policy regarding
16 rebates meant?

17 MR. RODGERS: Objection. And I'm going
18 to instruct him not to answer on the basis of the
19 deliberative process privilege.

20 BY MS. LEE:

21 Q. So based on this document, Gemini
22 disclosed that it sometimes provides some users



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1 whether you reviewed it or not.

2 A. Correct.

3 Q. Is that your testimony?

4 A. Yes.

5 Q. Mr. Kuserk, in your 32 years experience
6 working at the CFTC, based on your experience --
7 withdrawn.

8 Based on your experience working at the
9 CFTC over 30 years, what does pre-funding mean?

10 MR. RODGERS: So I'm going to object and
11 instruct him not to answer on the basis of the
12 deliberative process privilege.

13 BY MS. LEE:

14 Q. Do you know if there was an industry
15 standard about the meaning of "pre-funding" in or
16 around 2017?

17 A. Not that I'm aware of.

18 Q. Was the DMO the division in charge of the
19 issue of pre-funding in a product that's being
20 self-certified?

21 A. I guess I'd ask you to define what
22 pre-funding is.



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1 A. Right.

2 Q. Do you see the line that starts
3 with "pre-funding"?

4 A. Yes.

5 Q. It states that "Pre-funding requirements
6 for auction-only orders allowed for heightened
7 surveillance," right?

8 A. Okay. Yes.

9 Q. So when you were at the meeting on
10 July 25th and when you were looking at this deck,
11 what was your understanding of what that meant?

12 MR. RODGERS: Object on the basis of
13 deliberative process privilege, and I'm going to
14 instruct the witness not to answer.

15 BY MS. LEE:

16 Q. Did you -- at the meeting on July 25th,
17 2017, did you ask what this pre-funding
18 requirement for auction-only orders allows for
19 heightened surveillance means?

20 A. I don't recall.

21 Q. Do you recall anyone at the meeting
22 discussing that pre-funding requirement with



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1 with "as with."

2 A. Yep.

3 Q. The first bullet there states, "As with
4 all Gemini orders, auction orders must be fully
5 pre-funded.

6 Do you see that?

7 A. Yes.

8 Q. When you were at the meeting on
9 July 25th, 2017, what was your understanding of
10 what that meant?

11 MR. RODGERS: I'm going to object on the
12 basis of the deliberative process privilege and
13 instruct the witness not to answer.

14 BY MS. LEE:

15 Q. Do you recall during the meeting on
16 July 25th, 2017, if anyone discussed anything
17 about this bullet point, all auction orders must
18 be fully pre-funded on Gemini orders?

19 A. Yeah, I don't recall if there was a
20 discussion or not about it.

21 Q. Do you remember after the meeting anyone
22 discussing the issue of pre-funding?



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1 A. Right.

2 Q. -- after Chris Goodman received an e-mail
3 from Nicole Gordon from CFTC with attachments on
4 September 12th, 2017, correct?

5 A. Correct.

6 Q. Okay. So we are looking at one of the
7 attachments to that e-mail that you received.

8 So if you look at the second page of this
9 document. So it's page 2.

10 A. Okay.

11 Q. Bates number -- at the bottom, Bates
12 number ends with 13925.

13 A. Yep.

14 Q. At the very top, do you see the first
15 bullet?

16 A. Cost of capital?

17 Q. Yes.

18 A. Yes.

19 Q. Okay. So cost of capital states, "All
20 orders must be pre-funded, dollars must be
21 deposited prior to placing a buy order and bitcoin
22 must be deposited before placing a sell order.

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1 And participants are not permitted to place an
2 order unless they have enough funds in their
3 account to place such an order."

4 Do you see that?

5 A. Yes.

6 Q. So Gemini's statement explicitly says
7 that Gemini -- what Gemini meant by pre-funding
8 here, right?

9 A. Yes. It appears correct.

10 Q. Do you agree with Gemini's definition of
11 pre-funding?

12 MR. RODGERS: Object to the question on
13 the basis of the deliberative process privilege.
14 I'm going to instruct the witness not to answer.

15 BY MS. LEE:

16 Q. In this bullet point, cost of capital
17 regarding pre-funding, do you see anything in this
18 statement that says anything about sources of
19 funds?

20 A. No.

21 Q. Does this paragraph say anything about
22 the funds cannot be -- cannot be borrowed?



1 BY MS. LEE:

2 Q. -- during the self-certification; is that
3 right?

4 A. That would be correct. And as -- as I
5 look now, too, I think the whole pre-funding, as I
6 recall now, is that they were using -- I think the
7 idea was that what they were trying to argue is it
8 was you couldn't basically overleverage in the
9 Gemini market because you would have had to put up
10 the funds first, which would prevent some -- you
11 know, a trader who's, you know, basically put up
12 very little money but controls a lot of contracts.

13 So as I recall, I think that's what the
14 pre-funding argument was that they were making.
15 But we wouldn't have had any direct jurisdiction
16 over GM -- or Gemini in terms of any kind of
17 pre-funding rules that -- you know, that would
18 apply from our regs.

19 Q. Okay. So you just testified that it
20 wasn't within your direct jurisdiction over
21 Gemini --

22 A. Right, because --



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1 on whatever the issue was. But it's just a more
2 formal level. That happens very infrequently.

3 Q. During your -- while you were at the CFTC
4 for over 30 years, how many times have you seen a
5 self-certification having issues that are
6 elevate -- that's elevated to the Office of
7 General Counsel?

8 MR. RODGERS: Asked and answered.

9 THE WITNESS: I think I can recall once,
10 maybe twice.

11 MS. LEE: Can we take a break?

12 THE WITNESS: All right.

13 VIDEO TECHNICIAN: The time is 3:23 p.m.
14 This ends unit 4. We're off the record.

15 (A recess was taken.)

16 VIDEO TECHNICIAN: The time is 3:45 p.m.
17 This begins unit number 5. We're on the record.

18 BY MS. LEE:

19 Q. Mr. Kuserk, you testified earlier that
20 you don't know what pre-funding means, right?

21 A. I think, as I've gone through this, I do
22 have now a better understanding of what we're

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1 talking about. Yes.

2 Q. What is your understanding of what
3 pre-funding means?

4 MR. RODGERS: So object to the form of
5 the question based on the deliberative process
6 privilege. I'm going to instruct the witness not
7 to answer.

8 BY MS. LEE:

9 Q. Was the 2017 Cboe self-certification the
10 first time that you've heard of the term
11 "pre-funding"?

12 MR. RODGERS: Asked and answered.

13 THE WITNESS: I believe so. Yes.

14 BY MS. LEE:

15 Q. Did you or the CFTC ever evaluate whether
16 Gemini's pre-funding requirement affects a futures
17 product being readily susceptible to manipulation?

18 MR. RODGERS: So I'm going to object on
19 the basis of the deliberative process privilege
20 and instruct the witness not to answer.

21 BY MS. LEE:

22 Q. I'm going to go back to Exhibit 14. And



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1 Q. Okay. So based on this document that we
2 just reviewed, Exhibit 15, Gemini made three
3 changes to its auction to address CFTC's concerns,
4 right?

5 A. That's correct.

6 MR. RODGERS: Object. Misstates the
7 evidence.

8 BY MS. LEE:

9 Q. These three changes that Gemini made to
10 the auction, how important were these changes to
11 the final decision on Cboe's self-certification?

12 MR. RODGERS: I'm going to instruct the
13 witness not to answer based on the deliberative
14 process privilege.

15 MS. LEE: Counsel, we're not asking for
16 predecisional information. We're just asking for
17 final decision.

18 MR. RODGERS: My objection stands.

19 MS. LEE: Are you instructing the witness
20 to not answer the question?

21 MR. RODGERS: That's the objection and
22 the instruction.



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1 in -- representing other clients that I would have
2 been in meetings, you know, with him.

3 Q. Were you in meetings with him -- were you
4 in meetings with Mr. Raisler in regards to Cboe
5 self-certification?

6 A. On this particular contract?

7 Q. Yes. In 2017, Cboe self-certification.

8 A. I don't recall having a lot of
9 discussions with him on this issue, on this
10 particular contract.

11 Q. How relevant was pre-funding to the
12 CFTC's decision on self-certification?

13 MR. RODGERS: I'm going to object on the
14 basis of the deliberative process privilege and
15 instruct the witness not to answer.

16 BY MS. LEE:

17 Q. How would you define pre-funding in the
18 context of Cboe's self-certification?

19 MR. RODGERS: Same objection. Asked and
20 answered. And an instruction not to answer.

21 BY MS. LEE:

22 Q. I believe you testified earlier that



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1 to the redacted material was logged. And beyond
2 that, the witness is not able to testify about the
3 substance of the redacted material.

4 BY MS. LEE:

5 Q. Other than e-mails, are there other
6 documents that contain you and your colleagues'
7 analysis of whether a product is susceptible to
8 manipulation?

9 A. Not that I'm aware of.

10 Q. Can you think of anything that would
11 contain your and your colleagues at the CFTC's
12 analysis of whether a product was susceptible to
13 manipulation?

14 A. No. I can't think of anything.

15 Q. When you and your colleagues were
16 assessing the question of whether Gemini auction
17 was readily susceptible to manipulation, were you
18 applying the existing policies and procedures of
19 the CFTC?

20 MR. RODGERS: Objection to the extent it
21 calls for internal policies and -- internal
22 Commission communications and analysis. I'm going

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1 to instruct the witness not to answer.

2 BY MS. LEE:

3 Q. In assessing whether Gemini auction was
4 readily susceptible to manipulation, you were not
5 making up entirely new governmental policies to
6 assess the product, right?

7 MR. RODGERS: Objection. Same
8 instruction.

9 BY MS. LEE:

10 Q. Any decisions that were made in regards
11 to the Bitcoin Futures contract, those decisions
12 were related to that single product, right?

13 MR. RODGERS: I'm sorry, stand by.

14 I'm going to object. I'm confused by the
15 question and, frankly, for the -- I'm going to
16 instruct the witness not to answer to the extent
17 you're asking about non- -- you know, preliminary
18 deliberations and decisions.

19 BY MS. LEE:

20 Q. So when you were -- when you and your
21 colleagues at the CFTC was assessing the Bitcoin's
22 [sic] Futures contract, you were not creating new

1 policies to apply to the product, correct?

2 MR. RODGERS: Asked and answered. Same
3 instruction. Same objection.

4 BY MS. LEE:

5 Q. Did you ever reach a conclusion as to
6 whether the Bitcoin Futures contract or Gemini
7 auction were readily susceptible to manipulation?

8 MR. RODGERS: So this has been asked
9 several times, so I'm going to interpose the same
10 objection and instruct the witness not to answer.

11 MS. LEE: Can we take a short break?

12 MR. RODGERS: I'm ready to go. So if you
13 guys are done, I can get jump into it.

14 MR. SCHWARTZ: We want to make sure
15 we're done. Three minutes.

16 MR. RODGERS: Okay.

17 VIDEO TECHNICIAN: The time is 5:13 p.m.
18 We're off the record.

19 (A recess was taken.)

20 VIDEO TECHNICIAN: The time is 5:19 p.m.
21 This begins unit number 7. We're on the record.

22 MS. LEE: I don't have any more



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1 self-trading in the Gemini auctions?

2 MS. LEE: Objection to form.

3 BY MR. RODGERS:

4 Q. You can answer.

5 A. No.

6 Q. During the relevant time period, did
7 Gemini disclose to yourself or Commission staff
8 that Gemini provided advances of both fiat
9 currency and digital assets that were outstanding
10 for over a week?

11 A. No.

12 MS. LEE: Objection to form.

13 BY MR. RODGERS:

14 Q. Again, talking about the relevant time
15 period --

16 A. Uh-huh.

17 Q. -- did Gemini disclose to yourself or
18 Commission staff that, historically, there had
19 been multiple incidences of self-trading on
20 Gemini?

21 MS. LEE: Objection to form.

22 THE WITNESS: Can you clarify what you